SUPREME COURT OF THE UNITED STATES,

OCTOBER TERM, 1903.

No. 225.

ISABELLA GONZALEZ,
Petitioner-Appellant,

vs.

WILLIAM WILLIAMS, U. S. Commissioner of Immigration at the Port of New York.

Statement of the Case.

This is an appeal by Isabella Gonzalez from an order of the Circuit Court of the United States for the Southern District of New York dismissing a writ of *habeas corpus* and remanding petitioner-appellant to the custody of the defendant-appellee United States Commissioner of Immigration at the port of New York (Record, fol. 21).

The petition alleged that petitioner, Isabella Gonzalez, was a native-born inhabitant of Porto Rico and was such at the time of the proclamation of the Treaty of Paris (April 11, 1898), and that upon arriving from said island of Porto Rico on the 4th day of August, 1902, the said defendant had detained her in custody, pre-

vented her landing and was threatening to return her to Porto Rico (Record, fol. 1).

The return of the defendant to the writ of Habeas Corpus alleged that pursuant to the powers vested in him by the United States Immigration laws he had detained said Gonzalez as an "alien immigrant," in order that she could be returned as such in case it appeared probable that she might become a public charge (Record, fol. 6).

The Circuit Court dismissed the writ on the ground that the petitioner not having been born in the United States nor having ever been naturalized, retained the same status that she had before the cession of Porto Rico by the Treaty of Paris, consequently she was an alien and the Commissioner had jurisdiction to detain or deport her (Record, fols. 15-17).

The sole question here involved is the alienage of appellant.

If she is not an alien the Commissioner admittedly had no jurisdiction and the writ should not have been dismissed.

The law under which the Commissioner acted is as follows:

> United States Stat. at Large, Vol. 26, p. 1084 (Chapter 551) provide:
>
> "That the following classes of aliens shall be "excluded from admission into the United States "in accordance with the existing acts regulating "immigration other than those concerning Chinese "laborers: All idiots, insane persons, paupers or "persons likely to become a public charge. * * *
>
> "Section 8. That upon the arrival by water at "any place within the United States of any *alien* "*immigrants*, it shall be the duty of the command- "ing officer and the agents of the steam or sailing "vessel by which they came, to report the name, "*nationality*, last residence and destination of "every such alien before any of them are landed.

"* * * All decisions made by the inspection "officers or their assistants touching the rights of "any alien to land, when adverse to such right shall "be final unless appeal be taken to the Superin- "tendent of Immigration, whose action shall be "subject to review by the Secretary of the Treas- "ury. It shall be the duty of the aforesaid offi- "cers and agents of such vessel to adopt due precau- "tions to prevent the landing of any alien immi- "grant at any place or time other than that desig- "nated by the inspection officers, and any such "officer or agent or person in charge of such vessel "who shall either knowingly or negligently land "or permit to land any alien immigrant at any "place or time, etc.

"Section 10. That all aliens who may unlaw- "fully come to the United States shall, if practi- "cable, be immediately sent back on the vessel by "which they were brought in. * * *

"Section 11. That any alien who shall come into "the United States in violation of law may be re- "turned as by law provided, etc."

Introduction.

This case is noteworthy in that it involves much more than the liberty of an individual. The answer to the question whether or not petitioner is an alien must settle the status of all the native islanders who were in existence at the time the Spanish possessions were annexed by the United States.

The "Insular Cases" have not determined the question nor are any of the precedents to be found in our history precisely similar to the case of the Porto Rican *ante nati*. This is due to the difference in the nature of our recent acquisitions and those made formerly.

Of the Indian little need be said. Nomad tribes do not long survive the contact with civilization.

The populations taken over from France and Mexico were insignificant in number. They were, moreover, largely of Caucasian race and civilization, and a growing stream of immigration soon made the new lands thoroughly American. Moreover, the two civilizations were in fact equal or nearly so, and the treaties both of Paris (1800) and of Guadalupe Hidalgo (1848), recognized that fact by according to the new inhabitants the rights of American citizens. Thus the problem as to the legal status of the inhabitants of Louisiana and the territory acquired from Mexico was solved or solved itself *ab initio*. The underlying theory upon which both treaties were based was "expansion" rather than "imperialism."

But the problem of to-day cannot be solved either by extermination, as in the case of the Indian, nor by assimilation, as in the case of the few Frenchmen and Spaniards. Neither the methods of Miles Standish nor those of Jefferson will suffice us now. We must move on a heretofore untrodden path and find precedents upon which to base intelligent legislation and administration, not so much in our own history as in that of other nations who have preceded us in attempting to govern non-assimilable peoples.

In such an argument as this we must begin by defining the necessary terms, otherwise we will end as do many legal discussions in having with much clamor demolished a man of straw.

The object is to ascertain exactly what, under existing law, is the constitutional and legal status of the Porto Rican born before April 11, 1899. To call him a citizen when we are in hopeless disagreement as to the meaning of that term will only result in creating added confusion.

If the Circuit Court was correct, then we have to-day a new and seemingly paradoxical legal category of "American Aliens." The object of language is to denote objectively existing facts or relations. What idea the mutually exclusive term "American Aliens" can

convey it is difficult to say. The man without a country would thus be transferred from the realm of poetry into the domain of law, since an affirmance of the decision here appealed from would declare the law of the United States, as expounded by its highest tribunal, to be that there exists under the jurisdiction of the United States a large class of persons who are strangers and aliens here and in every other nation of the globe. There can be nothing in law or in fact to justify or necessitate so extraordinary a result.

Brief of the Argument.

I.—The petitioner-appellant cannot be sent back by the Immigration Bureau unless she is an "alien immigrant." If she does not fall within that class the statute cannot affect her; the Commissioner of Immigration had no jurisdiction, and the writ should have been sustained.

II.—The petitioner is not an alien because on April 11, 1899, she ceased to be a Spanish subject and her allegiance unquestioned, complete and permanent, was transferred to the Government of the United States by the Treaty with Spain proclaimed on that date.

This proposition is demonstrated by the following considerations:

(*a*) Allegiance is determinative of nationality or subjection. Our law of nationality, *i. e.*, the law which determines what persons are American nationals as contradistinguished from foreigners or aliens was derived from and must be examined in the light of the common law. That law makes nationality or subjection dependent upon allegiance.

(*b*) In the United States the tests as to what constitutes "nationality" or "subjection" are the same as the English common law. The problem has here been con-

fused, however, by the use of the word "citizen" in two senses. It is generally and properly used to indicate the holder of political rights or privileges in a State; as has been aptly said of a citizen in a democracy, "one who has a homeopathically diluted dose of sovereignty." Such persons may be accurately characterized as active citizens (burghers). The word has also been used in its broad sense as denoting all members of the nation and in this sense it has been considered as identical with subjection at the common law. Such persons may be characterized as passive citizens.

In our history there have been two apparent exceptions to the rule that passive citizenship and subjection are identical, and we have had persons who were neither citizens nor aliens. The free negroes under the Dred Scott decision were held by this Court not to be citizens, even in the general sense, yet they were not aliens but American nationals or subjects because their allegiance, complete and absolute was owing to the United States. Again, the Indian separated from his tribe was not considered a citizen, yet he could not well have been an alien, because he had no other allegiance than to the United States.

Elk v. *Wilkins,* 112 U. S., 94.
Kazzahoo v. *Adams,* 1 Dil., C. C.

The sole cases in which citizenship, in the latter sense, and subjection have not been identical are those of the free negro before the 14th Amendment.

The Porto Rican is, therefore, under our law, a subject or national—the only really debatable question being as to whether he is a citizen in the general sense, having the civil rights and status of such or whether he is a mere subject like the free negro and the Indian above mentioned. In no event is he an alien.

III.—The Judge at Circuit based his decision on the ground that the petitioner, not having been born in the United States, nor naturalized by the Treaty, must

have retained her original status just as though Porto Rico had not been annexed; consequently, she remained an alien. Granting the premises, the argument is fallacious in assuming that beause the petitioner is not a citizen, she is necessarily, and *ipso facto* an alien—no such alternative exists. The cession changed her allegiance. That fact is indisputable. The shifting of her allegiance changed her status from that of a Spanish national into an American national. The Court below overlooked the fact that there may be and have been subjects who are not citizens, and that the two are not necessarily exclusive terms. Hence his error. The treaty cession, if it did not *naturalize* the petitioner at least *nationalized* her.

IV.—This distinction between grades or classes of subjects or nationals is illustrated in the history of other countries. The French courts have held Algerians to be French subjects, in consequence of the *de facto* annexation of Algeria—although in the absence of legislation or treaty they could not be French citizens.

V.—A broad view of the Treaty leads to the conclusion that the natives were not only nationalized, but collectively naturalized by the cession.

ARGUMENT.

I.

Jurisdiction of the Immigration Commissioner.

The Commissioner could have no jurisdiction unless the petitioner were an alien. This is clearly stated by the learned Circuit Judge in the court below.

> "The only question open for discussion on this "application is whether or not petitioner is an

" alien. Upon all other questions the decision of " the appropriate immigration officers, when ad- " verse to the admission of the alien is made final, " unless reversed on appeal to the Secretary of " the Treasury. Act of Aug. 18, 1894 (28 Stat., " p. 390).

" It is true that this Court held to the contrary " *in re Martonelli*, 63 F. R., 437, following *in re* " *Panzara*, 51 F. R., 275, but the Act of 1894 was " not before it. The *Martonelli* case was decided " in October, 1894, before the statutes of that year " were published" (Rec., fols. 15-17).

II.

The cession of Porto Rico definitely transferred the allegiance of the native inhabitants from Spain to the United States.

The Treaty with Spain of December 10, 1898, provides that:

"Article II.

" Spain cedes to the United States the Island of " Porto Rico and other Islands now under Spanish " sovereignty in the West Indies, and the Island of " Guam in the Marianas or Ladrones."

"Article III.

" Spain cedes to the United States the arch- " ipelago known as the Philippine Islands, and " comprehending the Islands lying within the fol- " lowing line: * * *"

"Article IX.

" Spanish subjects, natives of the Peninsula, re- " siding in the territory over which Spain by the

"present treaty relinquishes or cedes her sover-
"eignty, may remain in such territory or may re-
"move therefrom, retaining in either event all
"their rights of property, including the right to
"sell or dispose of such property or of its proceeds;
"and they shall also have the right to carry on their
"industry, commerce and professions, being sub-
"ject in respect thereof to such laws as are applica-
"ble to other foreigners. In case they remain in
"the territory they may preserve their *allegiance*
"to the Crown of Spain by making, before a Court
"of Record, within a year from the date of the
"exchange of ratifications of this treaty, a declara-
"tion of their decision to preserve such allegiance;
"in default of which declaration they shall be held
"*to have renounced it and to have adopted the*
"*nationality of the territory in which they may*
"*reside.*"

"The civil rights and political status of the
"native inhabitants of the territories hereby ceded
"to the United States shall be determined by the
"Congress."

The treaty thus definitely accomplishes one legal result, it transfers the sovereignty of Spain over the Islands and their peoples to the United States and with such sovereignty necessarily the allegiance of the people, natives of Spain alone possessing the right to preserve their allegiance upon complying with the requirements of the treaty. The Porto Ricans have thus ceased to owe allegiance to Spain and now owe it to the United States. Whatever consequences follow from this fact cannot be avoided. But their allegiance or subjection having been transferred, they necessarily have become United States nationals or subjects. No other conditions are necessary to constitute American nationality.

The islanders cannot be aliens unless they owe allegiance to some other government, and even the most advanced anti-Imperialist will not contend that they are

still subject to Spain, however much he may deprecate the making of the Treaty of Paris.

The man without a country is not known to law. Having ceased to be Spanish subjects or nationals, Porto Ricans are no longer aliens and have become United States nationals or subjects.

The treaty actually accomplished a cession of the territory and a transfer of allegiance. It made the territory domestic territory (De Lima *v.* Bidwell, 182 U. S., 1.) The reservation as to political status and civil rights cannot change that cardinal fact. The country ceased to be a foreign country, yet Judge Lacombe holds the native inhabitants to be foreigners.

Aliens are merely foreigners residing or sojourning in the United States. An alien is necessarily a foreigner and must owe allegiance to another country.

> "An alien is a foreigner, a person resident in one "country but owing allegiance to another." Ency. Law, Alien.
>
> "Alien, not belonging to the same country, land "or government or the citizens or subjects thereof; "foreign; as alien subjects, enemies, property, "shores; wholly different in nature; foreign; ad- "verse." Webster's International Dictionary.
>
> "Alien, a stranger born; a person born in an- "other or foreign country as distinguished from a "native or natural born subject or citizen; in "English law, one born out of the legiance or al- "legiance of the king; in American law, one born "out of the jurisdiction of the United States. 2 "Kent's Com., 50. Alien and Foreigner are "synonomous terms. 1 Pet. R., 343." Burrill's Law Dictionary.

When the Porto Rican ceased to owe allegiance to Spain, it is difficult to see how he could still remain a foreigner. He was an inhabitant of domestic territory. Certainly he occupied a different relation to the United States from that which he had previously sustained.

He became subject to its laws and its exclusive sovereignty. These facts must have some significance.

The treaty could not take away his Spanish allegiance, transfer it to the United States and leave him unaffected.

The status of alienage or non-alienage depends upon facts. The facts accomplished by the treaty were none the less facts because the power was reserved to Congress to pass upon the status of the Islanders. Congress cannot make red men white men, even by Joint Resolution, nor can they make Porto Ricans aliens by calling them such. In order to become aliens they would have to pass under another domination. They might be transferred to Spain or ceded to some other power or given independence, but until then they *are and must remain United States nationals.*

The fact of alienage necessarily involves the idea of a power to whom allegiance is due. But no man or woman can owe the debt of allegiance without an equivalent. Who feels the advantage should also bear the burden, says the old adage; but it is equally true that he who is called to bear the burden should derive some benefit or compensation therefrom. What "commodum" or advantage does the appellant reap from her situation? To whom does she owe allegiance, outside of the United States? What nation in the wide world will raise, nay, will be permitted by us to raise a finger or even a voice in behalf of this woman if she is injured in her property and restrained in her liberty? What flag may she look to in her necessity, outside the flag of the United States? Against what Government or nation may she commit treason? And if she should commit such acts, in Porto Rico, against the sovereignty of the United States as constitute that crime, would she go unwhipped of justice because she had not been naturalized a citizen of the United States?

If it should be claimed that a Treaty alone and without an act of Congress cannot raise her out of her condition as a derelict alien, it is plain that such a claim cannot be sustained. The Treaty became from the date

of its ratification the supreme law of the land, and the language here is plain and unequivocal. Spain *cedes to the United States* the Island of Porto Rico and other islands now under Spanish sovereignty in the West Indies. This cession, accepted as it was, by the United States, necessarily transferred the sovereignty to this Government. That sovereignty plainly is, as it must be, exclusive of any foreign power.

Either Miss Gonzalez is an undefined waif, on the sea of political uncertainty, or she *belongs* to the United States, and may look to it for protection against injury, for redress where wrong has been done and for assistance where it may be needed against any Government of the earth, Spain included. The new master, viz., the United States, takes her allegiance with a burden, and having deprived her of all claim on the old master, has taken his place.

Other clauses of the Treaty make these considerations even more obvious than they might be if unaided by the terms of that instrument. To some extent, at least, the contracting parties had in contemplation the possible rights of the Spanish citizens who were transferred to a new sovereignty. There is a saving clause allowing an option to *Spanish subjects, natives of the Peninsula,* residing in the territory over which Spain by the Treaty relinquished or ceded her sovereignty. Such residents might *preserve* their allegiance to the Crown of Spain by making before a court of record a declaration of their intention to preserve such allegiance; otherwise they would be held to have renounced it and to have adopted "the *nationality* of the territory" in which they might reside.

> "Manifestly the *nationality of the inhabitants*
> "of territory acquired by conquest or cession be-
> "comes that of the government under whose domin-
> "ion they pass, subject to the right of election on
> "their part to retain their former *nationality* by re-
> "moval or otherwise, as may be provided."

Boyd *v.* Thayer, 143 U. S., at p. 162.

This clause may not directly assist Miss Gonzalez, for she is not a native of the Peninsula, and if she were, she has not availed herself of the privilege of filing the necessary declaration within the year. But is it not quite palpable that she has become vested with the same "nationality" as the Spanish native of the Peninsula who has chosen to sever his connection with Spain by failure to file the necessary declaration? It can hardly have been in the contemplation of the parties to the treaty that she and those similarly situated should be without any "nationality" whatever, while other ex-Spaniards assumed by their non-action the nationality of the territory in which they happened to reside. It seems plain that the intention was to make nationality the rule upon which the sole exception engrafted, was that in behalf of the native of the Peninsula. If he was satisfied with the "nationality" of American Porto Rico, he need only abstain from acting at all and the general rule of nationality applied to him.

III.

Allegiance determines Nationality.

(*a*) Nationality, broadly speaking, means simply membership in some political community. In the ancient world it was dependent upon descent (citizenship *jure sanguinis*) the State being based on the class, *i. e.*, tribal law. The descendant of a citizen was always a citizen wherever born, and the descendant of a foreigner always a foreigner, unless actually naturalized by positive legislation. At Rome the rule was "once a peregrine always a peregrine." The *Jus Sanguinis* thus inherited from the Roman law became the law in Europe, but for obvious historic reasons never took root in England. In that country the rule of *Jus Soli, i. e.*, subjection or citizenship because of birth within the King's

allegiance and dominion, was the law from the time of the Norman Conquest. As Prof. Pollock says:

> "A foreigner at the head of an army recruited "from many lands conquered England, became "King of the English and endowed his followers "with English lands. For a long time after this "there could be little law against aliens, there "could hardly be such a thing as English national- "ity" (History of the English Law, vol. I, p. 443).

Thus it came about that by the English law:

> "As regards the definition of the two great "classes of men which have to be distinguished "from each other, the main rule is very simple. "The place of birth is all important. A child born "within any territory that is subject to the King "of England is a natural-born subject of the King "of England" (*Id.*, p. 441).

Coupled with this rule, which has continued in England to be the law down to the present, was the doctrine of indelible allegiance and consequent denial of the right of expatriation. Hence the rule "once a subject always a subject"—but this doctrine was modified so that the right to change one's allegiance was finally recognized by allowing British subjects to expatriate themselves and aliens to become subjects by letters patent from the Crown or by Act of parliament, *i. e.*, by denization or naturalization.

Thus the sole requisite necessary to constitute a British subject is allegiance or subjection. This subjection, whether due to birth within the King's dominion or to a transfer of allegiance from a foreign sovereignty to English sovereignty, is the one essential requisite for determining the nationality of the individual. Either he owes allegiance to the sovereign or he does not. In the one case he is a subject, in the other he is an alien.

20839

It is quite evident that these two categories include all men and leave no middle class.

Whatever number of classifications may exist as to subjects and what rights, civil or political, belong to each class or how diverse may be the privileges accorded by law or treaty to aliens of one nation or another, the English rule leaves no room for quibble as to who are aliens and who are subjects.

It is quite clear that by the common law a change of sovereignty from a foreign domination makes the inhabitants, both *ante nati* and *post nati,* British subjects.

> "Naturalization by conquest was the conse-
> "quence of that change in the law of war by which
> "the conqueror instead of gaining captives and
> "slaves and property, obtained dominion and
> "subjects. This was the law soon after the arrival
> "of the Normans in England, and was certainly
> "understood to be so as early as the reign of Henry
> "II, when the people of Ireland became his sub-
> "jects from the conquest of the island. Lord
> "Coke mentions in his report of Calvin's case,
> "among the ways by which the denization of an
> "alien may be effected—that of conquest.
>
> "'As if the King and his subjects should con-
> "'quer another kingdom or dominion, *as well ante*
> "'*nati as post nati,* as well they which fought in
> "'the field, as they which remained at home for the
> "'defense of their country, or employed elsewhere,
> "'are all denizens of the Kingdom or dominion
> "'conquered.'" Coke Reports, Part VII, folio 6
> * * * "by such operation of law it is not too
> "much to assert, said Chalmers in 1814, that there
> "had been acquired to the British Empire since
> "the commencement of the present reign forty
> "millions of subjects." (Chalmers' Colonial Opin-
> ions, 663) Lawrence's Wheaton. Appendix, p.
> 894.

The English rule on the subject is admirably ex-

pounded by Lord Mansfield in *Campbell* v. *Hall*, 1 Cowper's Report, 204 (1774). This was an action against the collector of customs of the Island of Grenada to recover certain duties there levied in accordance with a Royal decree. The case thus involved the question as to the power of the Crown over captured territory, Grenada having been captured from the French and Parliament having taken no action in regard thereto.

> "The special verdict then states some articles "of the capitulation. * * * It next states "the 6th Article where to a demand of the inhab- "itants of Grenada, requiring that they should be "maintained in their property and effects, etc., the "answer is the inhabitants *being subjects* of Great "*Britain*, will enjoy their properties and priv- "ileges in like manner as the other, his majesty's "subjects, in the other British Leeward Islands; "so that the answer is that *they will have the con- "sequences of their being subjects*, and that they "will be as much subjects as any of the other Lee- "ward Islands."

Lord Mansfield then states general propositions governing such a case.

> "A country conquered by the British Arms be- "comes a dominion of the King in the right of "his crown; and therefore, necessarily subject "to the legislature, the Parliament of Great Brit- "ain."
>
> "The 2nd is, *That the conquered inhabitants "once received under the Kings protection, be- "came subjects, and are to be universally con- "sidered in that light, not as enemies or aliens.*"

The converse of this proposition is equally true. It is so stated by the eminent English commentator on International Law, Westlake.

"The cession of a British territory, or the "acknowledgment of its independence, causes the "loss of their British nationality by all persons "domiciled within it at the date of the cession." Int. Private Law, 203.

Doe *v.* Acklam, 2 B. & C., 779, held that all British subjects in America became aliens on the signing of the treaty recognizing American independence.

In the case of the Stepney Election Petition, 1886, 17 Q. B. D., 54, it was held that Hanoverians, born before the accession of Victoria, were British subjects, *not aliens,* but by the separation of the Crown they became aliens and could not vote in England. Lord Coleridge there said:

"It has long been settled that while the crowns "of the countries, are held by the same persons "the inhabitants of the two countries are not aliens "in the two countries respectively. * * * "

"The Hanoverian by birth who had needed no "naturalization in the life time of William IV "needed it when the Hanoverian heir and the suc-"cessor of that monarch was no longer the sov-"ereign of these islands. * * * He became "an alien because the sovereign to whom his allegi-"ance was due became a foreign sovereign; "* * * The crowns had by accident, been "united in one person, but when the union of the "crowns came to an end the union of allegiance "ceased too."

Thus the English law both ancient and modern is quite plain. Had Spain ceded Porto Rico to England in the same manner as she did to the United States, no possible doubt could have existed that the native inhabitants were British subjects. No question could have arisen here had it not been for the ambiguous meaning of the term citizen in American law.

The United States Government did not claim until this case arose that the islanders were aliens. The Attorney-General in the Insular cases took the position that they were subjects.

> "To be called an American subject is no dis-
> "grace. The term does not imply anything as to
> "the nature or form of the Government of which
> "one is a subject. It imports only that a person is
> "within the protection and allegiance,—either
> "permanent or temporary—of a particular sover-
> "eignty; it may be imperial or it may be republi-
> "can. *It does not signify in any degree the grade*
> *"or status of citizenship occupied by the person*
> *"within the domestic economy of his sovereign."*
>
> *"The Insular Cases."* Brief of Atty-Gen., 172.

(*b*) The question as to the meaning of the term citizen and what constitutes citizenship under the United States Constitution and laws, must be examined in the light of the English law.

U. S. v. *Wong Kim Ark,* 169 U. S., 655.

See also

Minor v. *Happersett,* 21 Wall., 162.
Ex parte Wilson, 114 U. S., 417.
Boyd v. *U. S.,* 116 U. S., 616.
Smith v. *Alabama,* 124 U. S., 465.
Moore v. *U. S.,* 91 U. S., 270.

> "The interpretation of the Constitution of the
> "United States is necessarily influenced by the fact
> "that its provisions are framed in the language of
> "the English common law and are to be read in the
> "light of its history."
>
> Justice Matthews in *Smith* v. *Alabama,* 124 U. S., 478.

"British subject means any person who owes "permanent allegiance to the crown" (Dicey Con- "flict of Laws, 173-7). *"Nationality or Allegi- "ance* in substance depended * * * not upon "the locality of a man's birth, but upon his being "born within the jurisdiction and allegiance of the "King of England."

"The term 'citizen' as understood in our law is "precisely analogous to the term 'subject' in the "common law, and the change of phrase has en- "tirely resulted from the change of Government" *Wong Kim Ark.,* 169 U. S., at pp. 657-8-664.

In a very recent case this Court again said:

"The term 'citizen' in our law is precisely "analogous to the term 'subject' in the common "law and the change of phrase has entirely re- "sulted from the change of government. The "sovereignty has been transferred from one man "to the collective body of the people and a 'sub- "ject' of the king is now a 'citizen' of the State."

Hennessy *v.* Richardson, 189 U. S., at pp. 34-35.

That the terms citizen and subject are at present identical in meaning is clear from *Minor* v. *Happersett,* 21 Wall., 162.

"The very idea of a political community, such "as a nation is, implies an association of persons "for the promotion of their general welfare. Each "one of the persons associated becomes a member "of the nation formed by the association. *"He owes it allegiance and is entitled to its "protection.* Allegiance and protection are, in "this connection, reciprocal obligations. The one "is a compensation for the other; allegiance for "protection and protection for allegiance.

"For convenience it has been found necessary to "give a name to this membership. The object is to

" designate by a title the person and the relation he
" bears to the nation. For this purpose the words
" 'subject,' 'inhabitant' and 'citizen' have been
" used and the choice between them is sometimes
" made to depend upon the form of the govern-
" ment. Citizen is now more commonly employed,
" however, and as it has been considered better
" suited to the description of one living under a re-
" publican government, it was adopted by nearly
" all the States upon their separation from Great
" Britain, and was afterward adopted in the Arti-
" cles of Confederation and in the Constitution of
" the United States. *When used in this sense it*
" *is understood as conveying the idea of member-*
" *ship of a nation and nothing more*" (pp. 165-6).

As has been tersely said by an eminent publicist:

" The law knows nations only as political com-
" munities, as sovereign and independent States.
" *Nationality,* therefore, as a legal attribute of per-
" sons, is connection with a certain body politic,
" membership in a particular State. The members
" of a State are called its subjects or citizens. The
" former term, if properly construed, is applicable
" to the people of any nation without regard to the
" form of government, for every State is based
" upon the relation of its members to its sover-
" eign. But the word subject has become historic-
" ally associated with the theories of feudal and
" absolute monarchy, and has thus fallen into dis-
" favor."

(Encyclopædia Political Science and United States History, article Nationality, by Munroe Smith.)

Mr. Butler in his recent work says that the word nationality is used to " distinguish the people of " the United States as a people rather than as a " race; the people of the United States forming as

"they do, a nation, are necessarily composed of "many races—Christian and Mohammedan— "Anglo-Saxon, Teutonic and Latin—Jew and "Gentile—all of these, as well as other racial ele- "ments, unite in forming one people as a nation; "in this sense therefore 'nationality' signifies as to "the people, the element of homogeneity by which "all these people are united, regardless of internal "and sectional differences, into a great nation, "owing allegiance to a common government as "against all of the other governments of the "world."

Butler, Treaty Making Power, p. 16*n.*, vol. I.

Summing up on this point it seems perfectly clear that the transfer of the allegiance of the native inhabitants made them subject to the jurisdiction of the United States; they were no longer foreigners, or aliens, but became subjects or nationals. This is enough for the purpose of the case, but the matter is of such importance that the question may perhaps be elucidated by inquiring whether, if having ceased to be aliens, they have become citizens or whether they form a class of nationals who are not also citizens.

III.

The change of allegiance, while it made the Porto Rican born before the cession a national or subject, did not necessarily make him a citizen.

The steps by which the Circuit Judge reached his conclusion that the petitioner was an alien are as follows:

I.—The inhabitants of Porto Rico were aliens prior

to the ratification of the Treaty of Paris, April 11, 1899.

II.—As such alien inhabitants they could only become citizens of the United States by naturalization.

III.—The petitioner having been born before the treaty, must show that she has been naturalized. She could invoke no law save the treaty of annexation. But conceding the possibility of collective naturalization by treaty, the Treaty of Paris expressly reserved the "civil rights and political status of the native inhabitants" to the future action of Congress.

IV.—Congress not having legislated as to the naturalization of Porto Ricans, they have not become citizens; *therefore, their original status remains unaffected and they are aliens.* Or to use the learned Judge's exact language:

> " Being foreign born and not naturalized, she re-
> " mained an alien and subject to the provisions of
> " law regulating the admission of aliens who come
> " to the United States" (Record, p. 16).

Thus, according to this decision, there is no middle ground between citizens and aliens, and any one who is not an American citizen is necessarily an alien.

"An American alien" certainly would seem, at least to one unaccustomed to some of the startling paradoxes of the law, a strange and monstrous category. Is it a logical result? We think not, and for the following reasons:

It is true that the ninth clause of the Treaty provides that the civil rights and political status of the native inhabitants of the territories ceded to the United States shall be determined by Congress. But this determination belonged to Congress in any event. It may plausibly be contended that the natives of Porto Rico did not

become "citizens" by virtue of the Treaty, for the Treaty does not in terms make, or profess to make, them such. It would be enough for our purpose that it "nationalizes" them, which may be quite different in its effect from "naturalizing" them.

If there is no difference between a national and an alien it was quite proper to exclude Miss Gonzalez from our country, because she had not gone through the forms of naturalization and renounced her allegiance to some foreign power which she would have found it difficult to name. If she had named Spain, which had rejected and repudiated her, an element of humor might be injected into the case, but would not relieve it of its difficulties.

"The political status and civil rights" having been reserved for the future action of Congress, it is possible to argue that no naturalization has taken place; it has, however, already been shown that the Porto Ricans were nationalized, that is to say, their allegiance transferred, but as nationalization does not necessarily mean naturalization, it may well be that they occupy an intermediate status between citizens of the United States and aliens. In other words, they are certainly entitled to the protection of the government, and, as far as foreign nations are concerned, are Americans, yet they may not be vested with all the rights of citizens of the United States.

What these rights of citizens of the United States are, it is very difficult to determine. The trend of doctrine in the Supreme Court of the United States seems to be that most of the rights of citizenship are under the protection of the States themselves, that civil liberty was not nationalized by the Fourteenth Amendment, and that only such rights as are expressly secured by the Constitution of the United States belong to the citizen; that for the vindication of all others he must look to the State. Thus the citizen of the United States who is not also a State citizen, but an inhabitant of a Territory, holds his rights subject to the discretion of Congress,

except in so far as that body may be limited by the express mandates of the Constitution. *Civil Rights cases, 109 U. S., 3.*

In the recent case of *Maxwell* v. *Dow,* 176 U. S., 581 at pp. 588-9, the Court quotes, with approval, the language of Mr. Justice Miller in the *Slaughter House cases,* referring to Section 2 of the Fourth Article of the Constitution, wherein it is provided that the citizens of each State shall be entitled to all the privileges and immunities of citizens of the several States. The Court says:

> "We feel no hesitation in confining these expressions to those privileges and immunities which are in their nature *fundamental;* which belong of right to the citizens of all free governments, and which have at all times been enjoyed by citizens of the several States which compose this Union from the time of their becoming free, independent and sovereign. What these fundamental principles are it would be more tedious than difficult to enumerate. They may, however, be all comprehended under the following general heads: Protection by the government; * * * The enjoyment of life and liberty with the right to acquire and possess property of every kind, and to pursue and obtain happiness and safety, subject, nevertheless, to such restraints as the government may prescribe for the general good of the whole."

It is thus apparent that the rights of citizens of the United States are almost impossible of definition. The general right to life, liberty and property, provided for by the Constitution and more specifically by the ten Amendments in favor of civil liberty, applies to all men alike, whether citizens or aliens. *Wong Wing* v. *U. S.,* 163 U. S., 228. See also Woodrow Wilson, The State, p. 498, §917.

The only positive right conferred by the Constitution

upon a citizen as such seems to be the right to sue in a Federal Court. This was the right which it was held that Dred Scott did not possess because not a citizen. Thus, as far as the Government of the United States is concerned, the inhabitants of the Islands, assuming them to be nationals, but not citizens, could hardly be said to have any lesser civil rights in fact than full citizens of the United States. While they could not sue in Federal Courts, this would scarcely be an additional burden to those that remained at home, because this right only belongs to a citizen of the United States residing in a State. It is not possessed by the residents of the District of Columbia, nor of the Territories of the United States.

As far as the action of the States themselves is concerned, the matter becomes somewhat more complicated. One of the most natural illustrations is as to the holding of real estate in the various States. In many of our States there exists as an obsolete remnant of the old and barbarous *Droit-d' aubaine,* the law by which an alien holder of real estate is subject to an action of forfeiture. This rule, according to the learned Mr. Pollock, arose historically from the habit of the English Crown of confiscating the estates of Norman nobles, situated in England, who swore allegiance to the Crown of France after the separation of Normandy from England. This practice ripened with time into a general rule of law. Its illustrious origin has long been forgotten, and it now remains as a remnant of ancient, time-honored law. History of the English Law, Vol. I, 441-50.

It is to be noted, however, that the right to hold real estate free from any interference on the part of the Government is not a right inherent in the citizen as such, but that the prohibition is simply a disability of alienage. Thus, if our theory be correct, a Porto Rican might well hold real estate in the City of New York, free from molestation by the Attorney-General, because, even if not considered a citizen, he certainly is not an alien, and, therefore, not under the consequent disabilities.

It is thus apparent that there are very few, if any, civil rights which in such a view he would not have in common with citizens.

As to political rights, however, the situation is entirely different. Usually, though not always, the right to vote in the various States is conditioned upon citizenship of the United States, and, if our theory be correct, statutes to this effect might not apply to a Porto Rican national, and thus in the absence of State legislation, especially made to fit his case, he would not be allowed to vote in the States. As some of the States, however, allow aliens to vote, after a declaration of intention to become citizens, this disability could and would easily, if the State desired it, be removed for the benefit of those of our new inhabitants who desired to settle in the States.

As a writer on International Law recently put it (Mr. Randolph, in his excellent article on "The Insular Cases"), "There is nothing in the Constitution of the United States to prevent a State from inviting an immigrant to go from the wharf to the polls and vote for presidential electors." Columbia Law Review.

It is thus manifest that the distinction here made between aliens and nationals is very important for the Islanders themselves, and if held sound by the Supreme Court of the United States, they will not be under the disability of alienage and will enjoy nearly, if not quite, all the ordinary civil rights pertaining to the citizen.

On the other hand, the distinction between the two classes of nationals, namely, citizens of the United States, that is to say, those born or naturalized within the United States, and those not born or naturalized therein, but owing allegiance thereto, is important. If Porto Ricans are not citizens of the United States, all the political privileges accorded by law to citizens as such would not apply to them, and thus in the absence of special legislation they would have no political rights in the various States until the States chose to change their legislation. In so far as the Islanders remaining at home are concerned, they would,

in any event, be subject to the complete control of Congress in the matter of political rights, the Constitution placing no limitation upon Congress, acting in and for the Territories, in that respect. In this regard they would be under no greater political disability than inhabitants of the District of Columbia.

It seems to us that this conclusion harmonizes with the general theory of the Treaty makers and the general policy of the government, which is to confer the ordinary civil rights upon the new inhabitants, while withholding from them all political privileges.

It may be asked whether they have the right to trial by jury and to the other civil rights guaranteed by the Constitution. It is sufficient to say that these rights are in no wise dependent, either upon citizenship or alienage. They are accorded to all persons.

It is quite possible, however, that the Supreme Court might decide that some of these limitations were only operative upon Congress when acting within the United States proper, and that, therefore, they did not apply to the new inhabitants. (Territory of Hawaii *v.* Osaki Mankichi, 190 U. S.) It is thus seen that this question is entirely beside that of citizenship or alienage and has only to do with the applicability of certain portions of the Constitution when limiting the power of Congress in legislating for the new territory.

This theory, while according to our new nationals certain rights, and conferring upon them a country, does not in any way interfere with the policies of the people of the United States by giving to the new peoples any political power, and hence any voice as to our government or institutions. They are alike cut off, in both cases, from any injurious interference in the destinies of the nation.

It is evident that there may be various gradations or subdivisions of subjection. Subjects may possess varying degrees of civil or political rights as is well said by one of the latest writers upon the subject.

"Generally the term citizen is used in regard to

"the 'national' invested with all civil and political "rights. We must not, however, confuse, as is too "often done, these two terms. *Every national in-"deed is not a citizen, although every citizen is a "national.* In France, for instance, minors, mar-"ried women and incompetents are not citizens, "but they nevertheless possess French nationality; "they are deprived of political rights and only "possess the enjoyment of civil rights. The Alge-"rians have not even the enjoyment of civil rights; "they are governed by the Mussulman law in their "relation between themselves, and yet they have "been solemnly declared Frenchmen by the *sena-"tus consultum* of 1865, and the decisions of the "Court had upon several occasions theretofore "recognized that they possessed this quality "(French nationality)." (Cogordan, La Nation-alité, pp. 7-8.)

The great publicist Bluntschli following the same line of thought, says:

"The body of full citizens rise above the general "mass of the members of a country or nation. "Full citizenship implies membership in the na-"tion, but more than that, it implies complete po-"litical rights; it is thus the fullest expression of "the relation of the individual to the State." (Theory of the State, English translation, p. 203.)

The framers of the Constitution probably supposed that in the United States, nationality and subjection were identical, that is to say, that all persons within the permanent allegiance of the United States were citizens just as such persons had been subjects of Great Britain before the Revolution. This view seems to have been practically undisturbed in the United States until the famous case of *Dred Scott* v. *Sanford,* 19 How., 399, which held that subjection and citizenship were not

necessarily identical and that there existed a class of persons in the United States who, although not aliens, were nevertheless not citizens. We refer to the status of the free Negro before the enactment of the XIVth Amendment.

> "The words (in the Constitution) 'people of the "United States' and 'citizens' are synonymous "terms, and mean the same thing. They both de- "scribe the political body who, according to our "republican institutions, form the sovereignty, and "who hold the power and conduct the Government "through their representatives. * * * Con- "gress might, as we have before said, have author- "ized the naturalization of Indians, because "they were aliens and foreigners. * * * The "African race, however, born in the country, did "owe allegiance to the Government, whether they "were slave or free; but it is repudiated and re- "jected from the duties and obligations of citizen- "ship in marked language" (pp. 404-5).

The question involved in the Dred Scott case was whether a free negro could sue as a citizen in the federal courts, and the decision was based upon the fact that he could not have been a member of the political people. It was the impossibility that he should have been invested with political rights that led the Court to declare him a mere subject.

The status of the colored race was, until the enactment of the XIVth Amendment changed their status, settled by this decision.

Mr. Chief Justice Fuller in his dissenting opinion in the case of *United States* v. *Wong Kim Ark*, 169 U. S., 649, says:

> "Nor would a naturalization law excepting per- "sons of a certain race and their children be in- "valid, unless the amendment has abridged the "power of naturalization. This cannot apply to

"*our colored fellow-citizens, who never were* "*aliens.*" (p. 729).

It was for the purpose of removing from our jurisprudence this class of persons who owed the United States allegiance and yet were not citizens that the XIVth Amendment defined citizenship. This definition made citizenship and subjection at the common law identical, as Mr. Chief Justice Fuller said, in the Wong Kim Ark Case (p. 727) referring to the fact that the 14th Amendment was intended to apply to the colored race:

> "They were not aliens (and even if they could "be so regarded, this operated as a collective nat- "uralization) and their political status could not "be affected by any change of the laws for the "naturalization of individuals."

As this Court said in *Elk* v. *Wilkins,* 112 U. S., 101:

> "The main object of the opening sentence of the "XIVth Amendment was to settle the question, "upon which there had been a difference of opinion "throughout the country and in this Court, as to "the citizenship of free negroes (Scott *v.* Sandford, "19 How., 393); and to put it beyond doubt that "all persons, white or black, and whether formerly "slaves or not, born or naturalized in the United "States, and owing no *allegiance to any alien* "*power,* should be citizens of the United States "and of the State in which they reside."

The only other instance in the history of the United States in which subjection and citizenship have not been identical is that of the status of the Indian living apart from his tribe and who has assumed the habits of civilization.

In the case of *Elk* v. *Wilkins, supra,* it was held that an Indian, born a member of one of the tribes, who was voluntarily separated from his tribe and had taken

up his residence among the white citizens of a State is not a citizen of the United States within the meaning of the XIVth Amendment.

The theory as to the legal status of Indians has always been, since the case of the Cherokee Nation *v.* Georgia, 5 Peters, 1, that the Indian member of a tribe owed immediate allegiance to his tribe, which was in turn under a general protectorate of the United States, and hence did not come either within the definition of subjection at the common law, or within the purview of the XIVth Amendment. Consequently it was necessary to consider him as an alien, a member of a tribe which the United States recognized at least as *quasi* independent by making treaties with it.

> "The Indian tribes, being within the territorial "limits of the United States, were not, strictly "speaking, foreign States; but they were alien "nations, distinct political communities, with "whom the United States might and habitually "did deal, as they thought fit, either through "treaties made by the President and Senate, or "through acts of Congress in the ordinary forms "of legislation. The members of those tribes "owed immediate allegiance to their several tribes, "and were not part of the people of the United "States" (*Elk* v. *Wilkins,* 112 U. S., p. 99).

On this theory, therefore, Elk was held not to be a citizen of the United States; having, however, renounced his allegiance to his tribe, it would seem that he had become at least a subject of the United States, and this was the view expressed by Mr. Justice Harlan in his dissenting opinion.

> "If he (Elk) did not acquire national citizen- "ship on abandoning his tribe and becoming, by "residence in one of the States, subject to the com- "plete jurisdiction of the United States, then the "Fourteenth Amendment has wholly failed to ac-

"complish, in respect of the Indian race, what, we "think, was intended by it; and there is still in "this country a despised and rejected class of per- "sons, with no nationality whatever, who, born in "our territory, *owing no allegiance to any foreign "power,* and subject, as residents of the States, "to all the burdens of government, are yet not "members of any political community nor entitled "to any of the rights, privileges, or immunities of "citizens of the United States" (*Elk* v. *Wilkins*, 112 U. S., p. 122).

Evidently Congress considered that an end should be put to so anomalous a situation and soon enacted that Indians who had separated themselves from their tribes and taken up civilized life should be considered citizens of the United States. (24 Statutes at Large (1887), chap. 119, sec. 6, p. 388, at p. 390.)

We have instanced the case of the free negro and of the Indian separated from his tribe, as the only illustration within our history in which it was possible to consider that we had a class of persons who, while owing allegiance to no foreign government, were not citizens, but merely subjects of the United States.

This is doubtless due to the fact that in our history we have been so little brought into contact with races inferior to us in development and civilization. Our former growth has been rather by expansion and assimilation than through the method of imperialism, *i. e.*, the domination over men of one order or kind of civilization, by men of a different and higher civilization. The negro problem was set at rest by the war and the Fourteenth Amendment; the Indian problem by the ruthless progress of civilization, which compelled the opening up and exploiting of the American continent by the overflowing population of old Europe. In the contact, the Indian gradually perished and the problem was reduced to very minor proportions through the agencies of fire water, gunpowder and well-intended but unwise policy.

The logic of events is often more powerful than that of Aristotle.

IV.

Illustrations of distinction between subjects and citizens.

Other civilized nations have, however, been brought in contact with uncivilized or semi-civilized tribes or people who become wholly subject to their jurisdiction, and whose legal status it consequently was necessary to solve.

We have seen that the English law has always treated such persons from the moment of the severance of their allegiance from their former masters as British subjects.

This natural and necessary consequence is also admirably illustrated by one of the most recent territorial acquisitions of France,—that of Algeria.

> "The conquest of a country like Algeria gives "rise to questions which cannot be governed by the "application of the ordinary rules of law followed "in Europe. In practice it has been admitted "that the Algerians were *French subjects,* not citi- "zens (it must be remembered) from the moment "that their country was definitely annexed to "France. Hence the tribunal of Paris did not "hesitate to declare, even before the treaty of "Tafma, of 20th of March, 1837, that the Alge- "rians were like other Frenchmen, dispensed from "the necessity of furnishing security for costs," Cogordan, La Nationalité.

The question was thus very similar to that involved in this case, as in neither case had the executive or the legislative authorities conferred any rights of citizenship

upon the annexed people, but their allegiance had been transferred from their former sovereign to the new one. The Court of Cassation declared that although there was no legislation fixing their status, and it had not been established by any treaty, nevertheless the Ordinance of the 10th of August, 1834, had submitted the Algerians to French law and sovereignty, and from that time it was no longer possible to treat them as aliens.

> "In declaring in its Art. 109 the union of "Algeria and the Colonies to the French Republic, "the Constitution of November, 1848, did not ef- "fect anything as to the nationality of the inhabi- "tants; since we find the counsel for the order of "lawyers of Algeria contesting the claim of a "native to be a Frenchman and hence the "possibility of his admission to the bar; "this case coming before the Court of Cassa- "tion it was held that by the very fact of the "conquest of Algeria the Israelite natives became "French subjects. Placed, indeed, under the "direct and immediate sovereignty of France, they "are unable in any event to claim the benefit or "aid of any other nationality, *from which it fol- "lows necessarily that the quality of Frenchmen "can alone thereafter be the basis and rule of their "civil and political condition.*" Glard, Nationalité Francaise, p. 380.

In matters of private law the Mohammedan subjects were left under their own rules and customs.

The French Government thus recognized a situation which we, until very recent years, refused to recognize in the case of the Indians, namely, that such tribes or peoples living under a different law and civilization, possessing a complete organization of their own, should be treated as nationals of the sovereignty to which they were really subject, but should be in their private relations governed by their tribal law. While we did not interfere with the tribal

law of the Indians, we yet affected to assimilate them rather to a foreign people than to nationals, and made treaties with them, in preference to legislating for them directly. Our legal theory was thus at variance with the actual facts.

The Algerian subject is accorded no political rights whatever and can possess none except by becoming a French citizen. This the Algerian may become either by legislation, for example, the Décret Crémieux, October, 1870, conferred French citizenship on the Israelite inhabitants of Algeria, or by naturalization, but this naturalization is somewhat different from the naturalization of an alien. The Algerian has only to make a simple declaration before the mayor, and after examination as to morality, etc., by the mayor and upon the recommendation of the Council of State, the naturalization is granted as matter of right.

Already French, the native Mohammedan is subject after his naturalization to all the French civil and political laws; he pays the French and not the Arab taxes. He becomes immediately an elector, and eligible to Parliament, etc.

Glard, Nationalité Francaise, 263.

An analogous question was presented when France annexed Cochin China. The native Anamite inhabitant is declared by law (Decree 25th, 1881) French, but he remains subject to his own local laws and customs except in special cases in which by complying with certain formalities he may be placed under the jurisdiction of the French law, just as in Algeria he may acquire the civil rights of a citizen by showing that he has reached the age of twenty-one and is able to speak the French language, etc. (Cogordan, La Nationalité, p. 139).

By the cession of Taïti to France in lieu of the former protectorate, the whole native population became French subjects. The law (31 Dec., 1880), declared that "French nationality has been acquired (*de plein droit*) by all the former subjects of the King of Taïti."

"Such a disposition is self-explanatory; the "sole manner of escaping the result is emigration "or the acquisition of a foreign nationality; they "are no longer subjects of the king of Taïti" (Glard Nationalité Française, p. 408).

See also other illustrations mentioned in Argument for Plaintiffs in Error De Lima *v.* Bidwell, 76-78.

We have thus seen that subjection is dependent upon allegiance, but that the civil and political rights of subjects may vary from those of the subjects who have full political rights (active citizens) to those who have limited civil rights (mere subjects). In our law and that of civilized States generally, except in cases of dependencies inhabited by semi or uncivilized people there are but two classes of subjects or citizens, namely, active citizens, that is to say those possessing political rights (burghers), and passive citizens, that is to say, those possessing full civil but no political rights, such as minors, women and incompetents. It is only, as the historic illustrations cited have shown, when civilized nations come into contact with people of a lower order of civilization that there is any disposition to refuse to subjects the ordinary civil rights. In Europe and America even aliens possess almost, if not quite all of the civil rights belonging to citizens, such as the right to possess property, to have recourse to the courts, etc.

It is for this reason that it has been difficult to apprehend that nationalization did not necessarily comport naturalization and that persons might cease to be foreigners or aliens without becoming citizens. We have seen that under our law the civil rights of citizenship in a broad sense, which would not also be possessed by any subjects or nationals of the United States, would be very few—the right to sue in the Federal Courts would be almost the only one belonging to passive citizens as distinguished from mere subjects. The fact that a national

was deprived of these rights would not convert him into an alien and he would not be governed by the laws relating to alienage.

V.

Conclusion.

There are three possible courses which this Court may adopt:

1. It may affirm the decision below and declare native islanders, born before the cession, aliens.

2. It may hold that the cession by transferring the allegiance of the natives made them United States subjects or nationals and that as such they are not under the statutory disabilities of alienage and cannot be deported under the Immigration law.

3. The Court may take the view that the cession of the Islands accomplished the naturalization of the native people and that they became passive citizens of the United States entitled to all civil rights of such.

See argument of undersigned counsel, De-Lima *v.* Bidwell, 182 U. S., p. 3.

It seems to us quite obvious that the choice will be between the last two. It would be impossible to affirm the judgment of the Court below without leading to an absurd and unnecessary result. Plain terms would cease to have any meaning and we would consider aliens persons who owed us their sole allegiance and to whom we owed our protection. Such a result is too palpably defiant of the laws of thought and language, is altogether anomalous and we must respectfully submit is clearly impossible.

The Court might, however, adopting the suggestion of the Circuit Judge that the treaty expressly refrained from naturalizing the native population, hold that they were not citizens, and as such not possessed of any civil rights, but that they had become American nationals or subjects and were therefore, not within the purview of statutes aimed at aliens.

This result could be supported by the precedent of the free Negro and the detached Indian,

> *Dred Scott* v. *Sanford,* and *Elk* v. *Wilkins, infra,*

and was the view taken by the Attorney-General of the United States at the time of the argument of the Insular Cases. While it has some logical force and may be supported by the two precedents referred to as well as by the precedents adduced from the history of foreign nations, such as that of Algeria, it seems to us nevertheless to be a narrow view.

The third view would seem to be more compatible with sound political science, as well as more in accord with the spirit of our Constitution, and the jurisprudence of this Court. While it may be said that the treaty reserved to Congress the right to pass upon the civil rights of the native inhabitants, the treaty could not change facts. It had accomplished the cession and the results naturally and necessarily following from cession cannot be avoided.

It could not have made the country a foreign country by stating that it should remain foreign although ceded to the United States and subject to its plenary jurisdiction.

Even the treaty-making power and Congress together cannot change facts by violating the laws of language.

It therefore seems to us that the cession of the territory, its becoming domestic territory (DeLima *v.* Bidwell), with the transfer of the allegiance of its inhabitants, naturalized the natives in the sense that they became passive citizens of the United States, enti-

tled to all the rights, privileges and immunities of such. Boyd *v.* Thayer, 143 U. S., 162.

Unless we adopt this course we are forced to have recourse to the two precedents in our history of which we are least proud, and to introduce for the third time into our system a class of persons whom it has always been our object to be free from. The XIVth Amendment, annulling the result of the Dred Scott Case, the Act of Congress doing away with the result reached in Elk *v.* Wilkins, would go for naught, and we would again be confronted by a situation in which citizenship and subjection were not identical.

The two precedents above adverted to give us no encouragement to attempt for the third time a repetition of that peculiar, and, from a standard of American civilization, most anomalous result.

All of which is respectfully submitted.

Dated, New York, November 30, 1903.

FREDERIC R. COUDERT, JR.,
PAUL FULLER,
CHARLES E. LEBARBIER.
Counsel.